



TOWN OF STRATHAM

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TO: Planning Board members
FROM: Mark Connors, Town Planner
DATE: February 10, 2023
FOR: February 15, 2023
RE: **Remand of Planning Board decisions in the Aberdeen West solar energy site plan and conditional use application approved on December 8, 2021**
ZONE: Manufactured Housing

I. BRIEF CASE HISTORY:

In 1988, the Planning Board approved the Aberdeen West development which consists of 23 mobile homes accessed by a private road on an approximately 29.6-acre parcel. During the Board's deliberations there was some discussion of adding additional units to the site, which it appears the Board wanted to prevent. Relevant excerpts of the May 25, 1988 Planning Board Minutes describing the Board's actions during approval include:

"The board had asked that the it be written on the mylar that there would be no further development on the parcel. Susan will have the information put on the mylar. The board asked for the carports, the phasing of 10-10-3 and the open space forever. So the board and developer understand 23 units are all that will be allowed on this parcel. Dottie Long made the motion that once the phasing, the open space, and the carports are on the mylar that the mylar be signed. Terry Barnes seconded the motion. Vote taken - all in favor."

The Planning Board's condition surrounding the open space, the limit of no additional units, and the restriction on additional development was memorialized in the form of Note 8 on the plan, which reads:

"There shall be no further development on this site. Open space and/or common land will continue to be used for conservation, park, and/or recreation purposes in perpetuity, and shall not be disposed of by sale or otherwise except to any organization established for the purpose of owning and maintaining such open space."

The plan was recorded and the development was subsequently built.

In 2021, the Aberdeen West Cooperative (the homeowner's association representing the property owners) submitted a Planning Board application to develop a 90 kilowatt ground-mounted solar array on the property. This use is classified as a medium size solar energy

system under the Town's Zoning Ordinance and is permitted subject to a Conditional Use Permit approval by the Planning Board.

The Planning Board held public hearings on the application on October 20, 2021 and December 8, 2021 and held a site walk of the proposed location for the facility on November 2, 2021. The Conservation Commission also reviewed the application and provided its comments to the Board. Several members of the public, including abutting property owners and residents of the mobile home park, submitted comments both in support and in opposition to the proposal.

The note on the 1988 plan restricting further development and requiring the open space be maintained "in perpetuity" was a source of considerable discussion during the Planning Board's deliberations. At the time, the Board was provided guidance that it had the option to either: (a.) Interpret the restriction to allow the solar installation because it represented a conservation use or to; (b.) Amend the language of the 1988 conservation restriction to allow the siting of the solar facility. Of course the Board also had the option to interpret the conservation restriction to not allow the solar facility and to decline to amend the restriction language which would thus result in the denial of the application.

At the December 8, 2021 hearing, by a vote of 3-1, the Board voted to interpret the condition to allow the siting of the solar facility on the parcel. The Board subsequently approved the Conditional Use Permit and site plan subject to several conditions.

II. CURRENT ISSUES BEFORE THE BOARD:

The abutting property owners, Robert and Cassandra LaPlante, filed a timely appeal of the Planning Board's decision in Superior Court and a hearing was held on the appeal in September 2022. The court issued a decision in November remanding the matter back to the Planning Board. There are two core issues that the court remanded the matter back to the Board for further consideration, including:

1. The Court ruled that the Planning Board's determination that the project would be in conformance with the 1988 conservation restriction was "legally erroneous." The court cited several arguments in its order to support this decision, but the key takeaway is that the Board cannot interpret the restriction to allow for the siting of the solar panels on the property. This path is closed.

The Court did note that as part of its approval of the site plan and conditional use permit, the Planning Board included a condition (Condition #9) requiring that a note be added to the plan indicating that the new plan amends the prior plan "to permit the installation of solar panels and related infrastructure depicted hereon, which shall be used exclusively to serve the residences located on the subject property and for which the Planning Board finds to be generally consistent with a conservation use."

The Court found that by adding this condition amending the 1988 plan while also finding the project to be congruent with the 1988 condition created ambiguity in the record and remanded the case back to the Board to clarify its intentions regarding Note 8. This issue is discussed in greater detail beginning on Page 3.

2. Additionally, the Court found the Board erred in two instances in its approval of the Conditional Use Permit (CUP). The Court found that no substantive discussion was included in the record to determine whether the use is compatible with the established character of the neighborhood criterion. The Court also found that when deliberating over how the project relates to existing uses or other uses permitted in the zone, the Board may have misapplied the criterion since a statement was made that the use “is allowed by zoning” whereas the use is permitted by Conditional Use Permit only. The Board will need to determine whether the proposal complies with the two criteria cited in the decision. The two relevant criteria are described in greater detail beginning on Page 4.

Conservation Restriction

The Board has the option to either leave the 1988 conservation restriction in place as written, which would prohibit the project from moving forward, or to approve an amendment to the language of the restriction to allow the siting of the proposed solar array. This decision is at the discretion of the Board. The parties to this action have submitted arguments in favor of leaving the existing language in place or of amending it (see correspondence from Attorney Eric Maher representing the LaPlantes and from Jeannie Oliver representing Aberdeen West).

Importantly however, the Court noted that “To the extent the Board intended (or intends on remand) to amend Condition 8 then, consistent with AWC’s November 29, 2021 letter to the Board, the Board should consider whether such an amendment would comport with the guidance provided by the New Hampshire Attorney General’s Office” (pg. 15). This reference included an endnote denoted below:

³ AWC’s November 29, 2021 letter to the Board contains a link to the New Hampshire Attorney General’s guidance on amending conservation restrictions like Condition 8. See C.R. 70 (citing <https://www.doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>). Having briefly reviewed the cited document, the Court observes that in addition to enumerating seven principles to consider when contemplating such an amendment, the Attorney General’s office has provided guidance as to whether a particular amendment should be deemed “low risk,” “more risk,” or “high risk.” The document encourages those considering such an amendment to confer with the Attorney General’s office, particularly if the proposed amendment poses “more risk” or “high risk,” such as when a neighbor may object to the proposed amendment.

The document cited by the Court was introduced by the applicant’s attorney in one of the materials submitted to the Board during its deliberations in 2021. Staff reached out to the Charitable Trust Unit of the NH Department of Justice and guidance was provided to the Town that the matter before the Board does not constitute a charitable trust as it does not relate to a conservation easement donated as a charitable gift. The Attorney General’s Office has indicated it will provide this determination in a letter to the Town prior to the Planning Board hearing. Staff will provide this as soon as it is received.

Still insofar as the Court requires the Board to “consider whether such an amendment would comport with the guidance” cited in the guidance document, staff would recommend that the Board go through the exercise of determining if the amendment meets the seven criteria outlined in the document. The Board may find that some language is not applicable as this is not a charitable trust matter, however staff would still recommend the Board go through this exercise to firm up its decision.

If the Board favors leaving the restriction in place as written, staff would recommend the Board cite some reasoning for doing so. For example, the Board could cite the high importance of maintaining open spaces in their natural states to the community. The 2019 Stratham Master Plan notes that “The role played by open spaces and parklands in defining Stratham’s community character cannot be understated” (pg. 55) and recommends maintaining “parks and natural resources in a way that protects our natural resources and balances the needs of people with varied interests and abilities (pg. 19). If the Board chooses this path, staff would recommend that the Board find the application fails to meet at least one of the criteria cited in the guidance by the SCPNHF and the NH Department of Justice noted below.

Alternatively, if the Board favors amending the conservation restriction, staff would recommend the Board deliberate and find the amendment meets all of the criteria in the AG’s guidance unless the Board finds criteria language is not applicable as no charitable trust is involved. Additionally, the Board should cite its reasoning for amending the restriction. For example, the Board might note the value of renewable energy sources to the community. The 2019 Master Plan notes the importance of encouraging renewable energy sources and notes that “the most promising technology is solar energy” (pg. 45). The Master Plan also recommends the Town “Encourage the use of alternative energy applications in both new development and redevelopment projects” (pg. 75).

The Seven Principles outlined in the guidance document are:

1. Clearly serve the public interest and be consistent with the easement holder’s mission.
2. Comply with all applicable federal, state, and local laws.
3. Not jeopardize the holder’s tax exempt status or status as a charitable organization under either federal or state law (if the holder is a land trust or other charitable organization).
4. Not result in “private inurement” or confer impermissible “private benefit” (as those terms are defined for federal tax law purposes and N.H. RSA 7:19-a).
5. Be consistent with the conservation purpose(s) and intent of the easement.
6. Be consistent with the documented intent of the donor, grantor, and any direct funding source.
7. Have a net beneficial or neutral effect on the relevant conservation values or attributes protected by the easement.

Conditional Use Permit

If the Board does not amend the 1988 conservation restriction, the Board does not need to deliberate over the two CUP criteria cited in the decision, since the existing restriction does not allow the siting of solar facilities on the parcel. However, if the Board amends the 1988 conservation restriction to allow the project, the Court remanded the following two Conditional Use Permit criteria for further deliberation by the Board:

iv. External impacts: The external impacts of the proposed use on abutting properties and the neighborhood shall be no greater than the impacts of adjacent existing uses or other uses permitted in the zone. This shall include, but not be limited to, traffic, noise, odors, vibrations, dust, fumes, hours of operation, and exterior lighting and glare. In addition, the location, nature, design, and height of the structure and its appurtenances, its scale with reference to its surroundings, and the nature and intensity of the use, shall not have an

adverse effect on the surrounding environment nor discourage the appropriate and orderly development and use of land and buildings in the neighborhood.

vi. Character of the buildings and structures: The design of any new buildings or structures and the modification of existing buildings or structures on the site shall not be incompatible with the established character of the neighborhood. This shall include, but not be limited to, the scale, height, and massing of the building or structure, the roof line, the architectural treatment of the front or street elevation, the location of the principal entrance, and the material and colors proposed to be used.

The Board will need to deliberate and determine if the project does or does not conform with the two criteria outlined above. If the Board determines that the project does not meet one or both of the criteria, it must vote to deny the Conditional Use Permit. If the Board finds that the application meets both criteria, it will need to approve the CUP.

In deliberating over the criteria, Board members should cite arguments or materials submitted by the parties that it found compelling (or similarly if it finds something unpersuasive and not supported) and cite reasoning for this determination. Board members can also share their observations and experiences related to the criteria and whether the use does or does not comport. However, staff would recommend that Board members refrain from offering opinions that are wholly subjective (i.e. “solar panels are ugly” or “solar panels are awesome”). The Board should also be cognizant of the Court’s clarification that ground-mounted solar energy systems are not permitted under the zoning, but permitted by Conditional Use Permit only.

Condition #3

If the Board does votes to both amend the conservation restriction and finds that the project conforms to both CUP criteria, staff would recommend one further action.

In its complaint, the plaintiff challenged Condition #3 of the Planning Board’s approval, which reads as follows:

3. The Landscape Plan shall be revised to the satisfaction of the Town Planner to ensure an adequate landscape buffer. Additionally, at the time of the planting, the Town Planner may require additional plantings be planted if it is apparent additional landscaping is necessary to establish a visual buffer. The Landscape Plan shall be updated to indicate a minimum number of plantings, to show landscaping planted in the area of the temporary driveway to provide a continuous landscape buffer, and to show at least three additional trees planted along the west side of the arrays.

The plaintiff challenged the process prescribed under Condition #3 arguing it did not allow for the abutters’ input or involvement in a public hearing. Notably, the court did not remand this issue back to the Planning Board, but did reserve the opportunity to review a future challenge or appeal. Staff would recommend that the Board revisit this issue in order to both address the concerns outlined by the abutters and to reduce the Town’s potential exposure to future appeals.

The applicant has had over one year to amend the landscape plan to meet the revisions recommended in the condition and expressed in the Planning Board’s deliberations.

Accordingly, the applicant should be able to produce a revised landscape plan amenable to the Board. If so, the Board could remove this condition and approve the application subject to the revised landscape plan.

However, if the applicant produces a landscape plan that is unsatisfactory to the Board or does not submit a revised landscape plan, staff would recommend requiring the applicant to provide a revised landscape plan to the Board within 60 days that would be reviewed in a public hearing. The Town Planner could obviously assist the applicant with this process, but the final approval would be left to the Board. This would be the recommended course. Alternatively, the Board could leave a condition that the Landscape Plan be revised, but staff would recommend the Board augment the wording to be as specific as possible regarding the changes the Board would like to see incorporated to the plan, including the specific number and type of plantings and their location(s) on the site.

III. ADDITIONAL MATERIALS:

I appreciate the Board's careful attention to the issues outlined in the Court Order and summarized in this memo. I trust the information provided in this memo and the documents linked below is suitable at this now, but staff will provide additional materials next week to further aid the Board in its review, including a decision matrix and draft motion language.

Superior Court Order (Roger LaPlante & Cassandra LaPlante v. Town of Stratham and Aberdeen West Cooperative):

https://www.strathamnh.gov/sites/g/files/vyhlf5051/f/pages/final_order_11-1-2022_superior_court.pdf

Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements: <https://www.doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>

Materials submitted by Plaintiff's (LaPlantes') counsel:

https://www.strathamnh.gov/sites/g/files/vyhlf5051/f/pages/2023_01_25_ltr_planning_board_re_remand.pdf

Materials submitted by Applicant's (Aberdeen West) counsel:

https://www.strathamnh.gov/sites/g/files/vyhlf5051/f/pages/2023-01-25_aberdeen_west_letter_to_planning_board_re_feb-15-2023_remand_.pdf

Planning Board Certified Record (includes all materials related to the 2021 Planning Board deliberations and decision): <https://drive.google.com/file/d/1niG4YFR7SnrG7ufqST-7JpEinBbO6mbi/view>